United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-6097

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

B

GARON CAMASSAR, Administrator, c.t.a., d.b.n.
of the Estate of Carvel P. Gramlich

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF and appendix OF THE PLAINTIFF-APPELLANT

Thomas B. Wilson of
Suisman, Shapiro, Wool & Brennan, P.C.
1028 Poquonnock Road
Groton, Connecticut 06340

PAGINATION AS IN ORIGINAL COPY

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 75-6097

GARON CAMASSAR, Administrator, c.t.a.,
d.b.n. of the Estate of Carvel P. Gramlich

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF OF THE PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUES

In a Federal Tort Claims Act action seeking damages for the wrongful death of an active duty U. S. Naval Chief Petty Officer, where the decedent, a passenger in a privately owned motor vehicle, was killed while on authorized liberty attending to purely personal affairs, and where the decedent's death is claimed to have resulted from a defective roadway, maintained by the United States Navy, did the District Court err in holding that the plaintiff's claim arose out of activity incident to service or arose out of military duty, and in granting the defendant's motion for summary judgment?

STATEMENT OF THE CASE

1. Nature of the Case

This is a claim brought under the Federal Tort Claims Act, 28 U.S.C. Secs. 1346(b) and 2671, et seq., seeking damages for the wrongful death of plaintiff's decedent who, at the time of his death, was a Chief Petty Officer on active duty with the United States Navy.

2. The Course of the Proceedings

Following the filing of an answer the parties entered into a stipulation of facts. (Appendix, p. 9a). The defendant then moved for summary judgment.

3. Disposition in United States District Court

The defendant's motion was argued before United States Magistrate Honorable Arthur H. Latimer. Magistrate Latimer rendered a proposed ruling which concluded that the decedent's death arose out of activity incident to service or arose out of military duty, that there was no genuine issue of fact material to that conclusion, and granted the motion for summary judgment. (Appendix, pp. 14a-22a).

Based on a somewhat different rationale than that proposed by Magistrate Latimer, United States District Judge Honorable Jon O. Newman adopted Magistrate Latimer's proposed ruling and granted the defendant's motion for summary judgment. On September 4, 1975 summary judgment was entered in favor of the defendant dismissing the action. (Appendix, p. 23a). This appeal followed.

4. Facts

The parties stipulated to certain facts as follows:

On Wednesday, February 16, 1972 the plaintiff's decedent was on active duty in the U. S. Navy serving in pay grade E-7 as a Chief Torpedoman's Mate. He was assigned to the U.S.S. FULTON, a U. S. Naval Submarine Tender. The FULTON was docked on Pier 2, Naval Ammunition Depot, Earle, New Jersey.

During the morning of February 16th the deceased was engaged in loading the FULTON. After loading the ship the deceased went to lunch on shore. He returned to the ship at approximately 1:00 P.M. for a muster.

At approximately 1:30 P.M. the deceased went on authorized liberty and departed the ship. He spent the afternoon on shore with several shipmates and friends. Two of the friends were Chief Charles H. Koblenzer, USN, and Chief William J. Bentfield, USNR. The decedent was at the Petty Officers Club at about 2:30 P.M. with Chief Koblenzer. During that time the decedent and Koblenzer arranged for an initiation party at the Club. The initiation party started at about 4:00-4:15 P.M. and ended at about 5:45 P.M. The decedent, Koblenzer, Bentfield and Chief Grady J. Broussard, USN, stayed at the bar of the Club until about 8:30-9:00 P.M. During the afternoon Koblenzer and the decedent arranged to pick up some wood for the decedent to use in making a model sailboat.

At about 8:30-9:00 P.M. Koblenzer returned to the ship in his privately owned vehicle. The decedent and Chiefs Bentfield and Broussard accompanied Koblenzer. When they arrived at the ship at about 9:30 P.M. the decedent and Bentfield carried the decedent's lumber on board the ship. After they accomplished this Koblenzer advised the decedent and Bentfield that he, Koblenzer, was going to meet his girlfriend for something to eat. The decedent and Bentfield said that they would go with Koblenzer. The parties stayed on the ship for about fifteen minutes.

At approximately 9:45 P.M., with Koblenzer driving his privately owned truck with the decedent and Bentfield as passengers, the men left the ship to return to shore. While proceeding on the pier on the way to shore the accident, which is the subject of this suit, occurred resulting in the death of the decedent.

Although it does not appear in the stipulation, it is also a fact that the U.S.S. FULTON was permanently home-ported at the United States Naval Submarine Base, Groton, Connecticut, and was docked at Earle for only temporary purposes. This fact was brought to the District Court's attention by way of a supplemental memorandum of law filed by the plaintiff on December 17, 1974. The defendant has not disputed that fact. (See Magistrate Latimer's proposed ruling (page 6) Appendix, p. 19a).

The stipulation does not contain facts relative to the cause of the accident. The plaintiff's claims in this regard are that the accident was caused by several defects in the roadway on Pier No. 2 where the FULTON was docked. The roadway also contained railroad tracks for trains. The truck became caught in the tracks, skidded, went out of control and went off the road into the water causing the drowning of Chief Gramlich. The plaintiff claims that the presence of the tracks, the lack of warnings, and the lack of a railing on the pier made the roadway defective and dangerous and caused the decedent's death. No claim is being made against the officers of the FULTON or those in the FULTON chain of command.

ARGUMENT

I

THE FEDERAL TORT CLAIMS ACT

This suit is brought under the Federal Tort Claims Act. That act, in relevant part, provides as follows:

> 28 U.S.C. §1346(b): "Subject to the provisions of Chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."
>
> 28 U.S.C. §2674: "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought in lieu thereof."
>
> 28 U.S.C. §2680: "Exceptions.--The provisions of this chapter and section 1346(b) of this title shall not apply to--
>
> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation,

whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed.

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal Law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives."

II

THE SUPREME COURT DECISIONS: Brooks v. United States and Feres v. United States

Shortly after enactment of the Federal Tort Claims Act, the United States Supreme Court considered the question whether members of the armed forces might recover under that Act for personal injuries. The government took the position that a serviceman could not, in any circumstances, maintain an action against the government under the Tort Claims Act. In Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918 (1949) the Supreme Court rejected the government's argument and held that members of the armed forces may recover under the Federal Tort Claims Act for injuries not incident to their service. In Brooks, two soldiers were riding in their automobile on a public highway. Their car was struck by an Army truck driven by a civilian employee of the Army. The court held that the injuries were not incident to Army service and that the Act allowed recovery.

Explaining, the court said: "The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. We are not persuaded that 'any claim' means 'any claim but that of servicemen.' The statute does contain twelve exceptions. 28 U.S.C.A. §2680. None excludes petitioners' claims.... Without resorting to an automatic maxim of construction, such exceptions make it clear to us that Congress knew what it was about when it used the term 'any claim'. It would be absurd to believe that Congress did not have the servicemen in mind in 1946 when this statute was passed. The overseas and combatant activities exceptions make this plain." 337 U.S. at 51.

The court went on to point out that prior bills introduced in Congress did contain exceptions denying recovery to members of the armed forces, but that the exception was dropped from the Federal Tort Claims Act, thus further indicating Congressional intent to allow such suits. 337 U.S. at 51-52.

The court expressed no opinion on whether recovery might be had for injuries "incident to service". 337 U.S. at 52.

The following year the court considered this latter question and in Feres v. U.S., 340 U.S. 135 (1950) held that the Tort Claims Act does not extend its remedy to one sustaining injuries which "arise out of or are in the course of activity incident to service." 340 U.S. at 146.

The Feres case consisted of three companion cases: (1) Feres v. United States. Feres perished by fire in a military barracks while on active duty in the service of the United States. Negligence was alleged in quartering him in a barracks with a defective heating plant and inadequate fire watch; (2) Jefferson v. United States. Jefferson, while in the Army, was required to undergo an abdominal operation. Eight months later in the course of another operation after he was discharged, an Army towel was discovered in and removed from his stomach; (3) Griggs v. United States. Griggs, while on active duty died because of negligent medical treatment by Army surgeons. As the court noted, the common fact was that each claimant, while on active duty and not on furlough, sustained injury due to the negligence of others in the armed forces.

The court affirmed the judgments of the Second Circuit Court of Appeals in Feres and the Fourth Circuit Court of Appeals in Jefferson, each of which had denied recovery. The court reversed the judgment of the Tenth Circuit Court of Appeals in Griggs which had allowed recovery.

The Feres court distinguished Brooks by noting that "the injury to Brooks did not arise out of or in the course of military duty. Brooks was on furlough, driving along the highway, under compulsion of no orders and on no military mission." 340 U.S. at 146. The court in Brooks allowed recovery "primarily because Brooks' relationship while on leave was not analogous to that of a soldier injured while performing duties under orders." Ibid.

The facts of the instant case clearly bring this case within the Brooks doctrine. Later lower court decisions discussed hereafter make this clear. Before discussing those cases, however, there is one further Supreme Court case which must be noted. In United States v. Muniz, 374 U.S. 150 (1963) the Supreme Court held that a federal prisoner can sue under the Tort Claims Act to recover damages for personal injuries sustained during confinement in a federal prison by reason of the negligence of a government employee. The court, reasoning in the same manner as it did in Brooks, said that the face of the act was broad enough to include the suits, and although Congress could have created an exception, it did not do so and the failure to exclude such suits was deliberate. The court, rejecting the government's argument that the claims were barred by Feres, explained Feres by the "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty." 374 U.S. at 162, quoting United States v. Brown, 348 U.S. 110.

Reading Feres and Brooks together, with the gloss put on them by Muniz, it becomes clear that the tests used to determine whether an injury arose out of or in the course of activity incident to service are:

(1) Did the injury arise out of or in the course of military duty;

(2) Was the plaintiff on furlough (cases discussed hereafter will demonstrate that, for present purposes, "liberty" and "furlough" are equivalent);

(3) Was the plaintiff under compulsion or orders;

(4) Was the plaintiff on a military mission;

(5) Was he injured while performing duties under orders;

(6) Will the allowance of the suit have an adverse effect upon discipline.

In this case Chief Gramlich's death did not arise out of or in the course of his duty; he was on liberty; he was not under compulsion or orders; he was not on a military mission; he was not injured while performing duties; and the allowance of the suit will not have an adverse effect upon discipline.

III

OTHER DECISIONS DEMONSTRATE THAT THIS CASE IS GOVERNED BY BROOKS V. UNITED STATES

While the plaintiff recognizes the difficulty in determining the Feres - Brooks boundary in any individual case, the plaintiff submits that the facts of this case bring it squarely within the Brooks rule as explained by Feres and Muniz. A number of the decided cases support this position.

For example, in Mills v. Tucker, 499 F.2d 866 (9th Cir. 1974) the decedent was a petty officer on active duty in the Navy stationed at Hickam Air Force Base, Hawaii. He was riding a motorcycle when struck by another car

negligently operated by a government employee. He was on an access road maintained by the Navy adjacent to a Naval Ammunition Depot. He was on furlough returning from a civilian job to his Navy owned quarters. The roadway was not part of the depot. It was bounded on one side by privately owned farmland and fenced off from the base. It was publicly used. Drivers were not required to pass through a gate to reach it. It connected several different civilian areas. The court held that the case was governed by Brooks and that the government was not immune from suit.

The decedent in the present case was, like the decedent in Mills, only in the remotest sense subject to military discipline.

The court in Mills, as did the court below, considered the question of on-base accidents vis-a-vis off-base accidents. The court in Mills mentioned cases such as Chambers v. United States, 357 F.2d 224 (8th Cir. 1966) (on base swimming pool case); Coffey v. United States, 324 F.Supp. 1087 (S.D.Cal. 1971), aff'd, 455 F.2d 1380 (9th Cir. 1972) (Marine on pass struck by train on base); and Gursley v. United States, 232 F.Supp. 614 (D.Colo. 1964) (injury in on base military housing), and distinguished them, in dicta, on the ground that "such cases involve on base accidents where the serviceman is at least subject to ultimate military control." Mills v. Tucker, 499 F.2d 866 at 868. Magistrate Latimer attached some significance to the on-base versus off-base distinction. Judge Newman attached somewhat more importance to the situs

of the accident stating that "If that is the correct approach, it at least makes decisions more certain for injuries either on a base or within the confines of a functional equivalent." Judge Newman further held that the pier in question was the "functional equivalent" of a base.

The plaintiff submits that this holding is not correct for two reasons. First, the decedent's "base" was the U.S.S. FULTON, not the Naval Ammunition Depot. Further, the pier in question was no more the functional equivalent of the base than was the roadway in Mills v. Tucker. The roadway in Mills, which was maintained by the Navy, was adjacent to the base. The pier here, also maintained by the Navy, was adjacent to the base on which Chief Gramlich was stationed, i.e., the U.S.S. FULTON.

Second, even if the pier at Earle is considered the functional equivalent of Gramlich's base, the location of the accident should not be employed as the test for determining whether Gramlich's activities were incident to his service. In the following cases the fact that the accident occurred on a military installation did not preclude the maintenance of the suit against the government.

See, for example, Hand v. United States, 260 F.Supp. 38 (M.D.Ga. 1966), where plaintiff was on active duty in the U.S. Army assigned to Fort Benning, Georgia. At the end of duty on December 10, 1964 he obtained a twenty-four hour pass. He decided to go on a bird hunt during

the pass. While proceeding on a highway traversing Fort Benning, in a civilian automobile, the car in which he was riding was struck by a military vehicle negligently operated by a military driver acting in the scope of his duty. The highway was on base, but was not considered a "military road". It was held that this case was governed by Brooks, not Feres, and the plaintiff was therefore entitled to recover. The important point was that the plaintiff was on pass. This was held to be the equivalent of the "furlough" in Brooks. The only difference between a furlough and a pass is that a furlough is for a longer period of time and is charged against a man's records, while a pass is for a shorter period of time and is not charged against a man's record. There is no difference in the freedom which the man enjoys. In both instances the man is relieved from military duty during the period specified. 260 F.Supp. at 41.

The court also held that the fact that the collision occurred on the military reservation itself did not distinguish the case from Brooks. "...The question is not where the plaintiff was at the time of injury, but the question is whether what the man was doing at the time of injury was in the course of activity incident to his military service." 260 F.Supp. at 42.

Downes v. United States, 249 F.Supp. 626 (E.D.N.C. 1965) also supports the plaintiff's position. In Downes, the plaintiff was on active duty in the Marine Corps. At

6:00 A.M. on January 30, 1964 he reported to his unit. He was given a pass from 7:30 A.M. January 30, 1964 to 6:30 A.M. January 31, 1964 so that the plaintiff might go to his off base home to attend to personal affairs. At 8:00 A.M. while proceeding toward home, the accident occurred. The collision occurred on the base and plaintiff was in military dress operating his own automobile. The government, claiming that the suit was barred under the Feres doctrine, moved for summary judgment.

The court, denying the motion, held that the plaintiff was not injured as a result of the performance of conduct incident to his military service. The court said: "The real question then is a factual one: Was plaintiff performing duties of such a character as to undermine traditional concepts of military discipline if he were permitted to maintain a civil suit for injuries resulting therefrom? The answer is obviously NO. The United States cannot be heard to rely on the broad principles stated in Feres v. United States, 340 U.S. 135, 71 S.Ct. 153, supra, to the exclusion of those established in Brooks v. United States, 337 U.S. 49, 69 S.Ct. 918, supra, and so concisely enunciated in United States v. Brown, 348 U.S. 110, 75 S.Ct. 141, supra.

In Wilcox v. United States, 117 F.Supp. 119 (D.C.N.Y. 1953), the decedent was a sergeant on active duty in the U.S. Army assigned to the military base on Governor's Island, New York. On February 2, 1952 at about noon he completed his

assigned duties and went to the N.C.O. Club with a fellow sergeant. At 8:00 P.M. he left the club in fact on his way home at the time with his companion, in the latter's automobile. He did not arrive home. Ten days later his body and the companion's body were found in the latter's auto twenty feet off shore from Governor's Island in New York Bay. Both men had died from drowning. Wilcox had a "regular Class 'A' permanent pass". The plaintiff's claim was that the government was negligent in maintaining the roadway and seawall on Governor's Island and that this was the proximate cause of Wilcox's death. The government moved for summary judgment based on Feres. The government argued that since Wilcox was only on "pass" (limited to 72 hours) and not on "leave", that Feres applied. The court rejected this distinction and held that there was a question of fact as to whether Wilcox's death was incident to service. Therefore, the motion was denied.

Boyd v. United States, Civil No. 15,384 (D.Conn. 1973), aff'd, 493 F.2d 1397 (2d Cir. 1974), is factually distinguishable. First, of course, Boyd was precisely within the foreign country exception of 28 U.S.C. §2680(k). Second, in Boyd the plaintiff was an Air Force Sergeant assigned to the base on which he was injured. He brought the suit claiming that the military authorities exercising jurisdiction and control over that base were negligent. The rationale of the decision was that the plaintiff's claim was an unequivocal challenge to the adequacy with which base affairs were regulated

by the responsible military authorities and that this was a direct intrusion upon matters of military command.

In the present case, however, Chief Gramlich was assigned, not to the Naval Ammunition Depot, Earle, New Jersey, but rather to the U.S.S. FULTON, a U.S. Naval Submarine Tender.

This distinction is critical because the plaintiff in this case is not questioning the command over Gramlich but is rather questioning the command with respect to the maintenance of facilities at the Naval Ammunition Depot. Gramlich was responsible, not to the Commander of the Naval Ammunition Depot, but rather to the Commanding Officer of the U.S.S. FULTON.

The challenge in this case, while an intrusion upon matters of military command regulating the Naval Ammunition Depot, Earle, New Jersey, is not an intrusion upon matters of military command of the U.S.S. FULTON; that is, the military command to which the decedent was subject. In that sense the site of the accident is potentially irrelevant and brings this case on the Brooks side of the issue.

The court below did not base its decision solely on the ground that the injury occurred on the functional equivalent of a base. The test adopted by Magistrate Latimer was "the existence or absence of meaningful causal connection between the injury occurrence and the injured person's military service." (Ruling on Defendant's Motion for Summary Judgment, p. 6). Or "remoteness between injury and the injured person's military status." (Id. at p. 5). That test does not have

support in Brooks, Feres or Muniz--the tests drawn from those cases, the plaintiff submits, are those set forth in Part II of this argument. Nevertheless, even if the "remoteness" test is a proper one, the plaintiff submits that the connection between Chief Gramlich's death and his military service was so remote as to take this case out of the Feres rule. For some eight hours prior to the accident Gramlich had been on liberty, free to attend to personal affairs, and in fact did engage in purely personal affairs, mostly of a social nature. It was for solely personal reasons that he went back to his ship at 9:30 in the evening and it was likewise for purely personal reasons that he left the ship on his ill-fated last trip. The only sense in which it could be said that there was a causal connection between Chief Gramlich's death and his military service "is in the sense that all human events depend upon what has already transpired." Brooks v. United States, supra at 52. Gramlich was in the process of leaving his ship to attend to purely personal affairs. This cannot logically be distinguished from the activities of the deceased in Mills who was returning to his Navy owned quarters to attend to personal affairs nor from the activities of the servicemen in Hand, Downes and Wilcox.

See also, e.g., Knecht v. United States, 242 F.2d 929 (3d Cir. 1957), where the decedent, a soldier off duty on a pass, was travelling on an off base highway in Alaska. He was killed as a result of the negligence of government employees in transporting a quonset hut on the highway. The

Court of Appeals affirmed the District Court judgment in favor of the plaintiff. The District Court decision was based on the test that the decedent's time was his own and his activities were not controlled by his military status, precisely the situation in the case at bar. 144 F.Supp 786 at 789 (E.D.Pa. 1956).

The plaintiff's position also finds support in Rich v. United States, 144 F.Supp. 791 (E.D.Pa. 1956) where the plaintiff, on a weekend pass, was injured early on a Sunday morning in a motor vehicle accident while on his way back to the camp. The court, denying the government's motion for summary judgment, said:

> "...The determinative fact in each case is not where the plaintiff was at the time he was injured (whether on or off the military reservation) and not whether he was at the time on pass, furlough, or "leave" (although these things may have a bearing on the utlimate question), but whether what he was doing at the time was, in the language of the Feres case, 'in the course of activity incident to service.'"

See also, Snyder v. United States, 118 F.Supp. 585 (D.Md. 1953) which holds that a "liberty pass" is the equivalent of the Brooks "furlough"; and Barnes v. United States, 103 F.Supp. 51 (W.D.Ky. 1952) which holds that a "pass" is equivalent to a "furlough".

Bradshaw v. United States, 443 F.2d 759 (D.C. Cir. 1971) involved a policeman of the District of Columbia. It is not directly relevant, but it is helpful in analyzing

the Brooks - Feres boundary question. The court, MacKinnon, C.J., stated that "The Brooks - Feres distinction falls into the work related--non work related dichotomy characteristic of workmen's compensation schemes generally." 443 F.2d 759, 763. Viewed in that light it is obvious that Chief Gramlich's death was not work related.

Many of the cases cited in the district court decision are medical malpractice cases: Henning v. United States, 446 F.2d 774 (3d Cir. 1971), cert. denied, 404 U.S. 1016 (1972); Shults v. United States, 421 F.2d 170 (5th Cir. 1969); Harten v. Coons, 502 F.2d 1363 (10th Cir. 1974), cert. denied, 420 U.S. 963 (1975); Lowe v. United States, 440 F.2d 452 (5th Cir. 1971), cert. denied, 404 U.S. 833 (1971); Buckingham v. United States, 394 F.2d 483 (4th Cir. 1968); Norris v. United States, 137 F.Supp. 11 (E.D.N.Y. 1955), aff'd per curiam, 229 F.2d 439 (2d Cir. 1956); Henninger v. United States, 473 F.2d 814 (9th Cir. 1973), cert. denied, 414 U.S. 819 (1973); and Hall v. United States, 451 F.2d 353 (1st Cir. 1971). These cases are factually indistinguishable from the Griggs and Jefferson cases decided with Feres v. United States. They all make clear that when the patient is admitted to a military hospital for medical treatment he thereupon becomes subject to all lawful orders issued in the course of such treatment. The universal rule is that malpractice claims arising out of such treatment are barred.

CONCLUSION

The decedent's death did not arise out of or in the course of activity incident to service in the United States Navy. The plaintiff, therefore, may maintain an action under the Federal Tort Claims Act. The judgment of the District Court should be reversed.

December 1975

Respectfully submitted,

THE PLAINTIFF

By Thomas B. Wilson of
Suisman, Shapiro, Wool & Brennan, P.C.
1028 Poquonnock Road
Groton, Connecticut 06340
His Attorney

I certify that a copy of the within and foregoing brief was mailed to the Office of the U. S. Attorney, District of Connecticut, 450 Main Street, Hartford, Connecticut.

Thomas B. Wilson

75-6097

IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GARON CAMASSAR, Administrator, c.t.a., d.b.n.
of the Estate of Carvel P. Gramlich

Plaintiff-Appellant

vs.

UNITED STATES OF AMERICA

Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

APPENDIX TO BRIEF OF PLAINTIFF-APPELLANT

Thomas B. Wilson of
Suisman, Shapiro, Wool & Brennan, P.C.
1028 Poquonnock Road
Groton, Connecticut 06340

TABLE OF CONTENTS - APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

GARON CAMASSAR, Administrator, C.T.A., D.B.N. of the Estate of Carvel P. Gramloch	:	
	:	CIVIL NO. 15,845
VS.	:	USCA NO. 75-6097
UNITED STATES OF AMERICA	:	

INDEX TO RECORD ON APPEAL

CIVIL DOCKET

UNITED STATES DISTRICT COURT

JON O. NEWMAN

15845

Jury demand date:

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
	For plaintiff:
CARON CAMASSAR, Administrator, C.T.A., D.B.N. of the Estate of Carvel P. Gramlich	Dale P. Faulkner James F. Brennan, Jr. Suisman, Shapiro, Wool & Brennan 325 State Street New London, Connecticut
vs.	
UNITED STATES OF AMERICA	Thomas B. Wilson Suisman, Shapiro, Wool & Brennan 1028 Poquonnock Road Groton, Conn.
	For defendant: Stewart H. Jones Henry S. Cohn 450 Main Street Hartford, Conn.

STATISTICAL RECORD	COSTS			DATE 1973	NAME OR RECEIPT NO.	REC.		DISB.	
5 mailed	Clerk			8/30	Suisman,	15	00		
					Shapiro,				
					Wool &				
6 mailed	Marshal				Brennan				
				8/31	Deposit:				
s of Action: Plaintitf	Docket fee			"	G.F.100869			15	00
cedent was drowned				1975					
a result of an acci-	Witness fees			10/2	Suisman,	5	00		
t on defendant's					Shapiro,				
~~ion-procedure~~: (U.S. Navy's)	Depositions				Wool &				
er #2 roadway, Earle					Brennan				
al Depot, Leonardo,									
Jersey) allegedly due to				10/7	Deposit:				
ective and dangerous con-					G.F.100869			5	00

15845

DATE 1973	PROCEEDINGS	Date Ord Judgment
8/30	Complaint filed. Summons issued.	
"	Appearance of Dale P. Faulkner and James F. Brennan, Jr., Esquires, entered for Plaintiff.	
8/31	Marshal's Return Showing Service, filed.-Summons & Complaint.	
9/4	Notice to Clerk of Nature of Action, filed by Atty. Faulkner.	
11/28	Appearance of Stewart H. Jones, U.S. Atty. and Henry S. Cohn, Asst. U.S. Atty. entered for defendant.	
"	Answer, filed by defendant.	
11/30	Placed on trial list.	
1974		
11/7	Motion for Summary Judgment, Brief on Motion and Stipulation, filed by defendant.	
11/15	Appearance of Thomas B. Wilson entered for plaintiff.	
"	Motion for Extension of time, to November 22, 1974, to file a memorandum in opposition to Defendant's Motion for Summary Judgment, filed by Plaintiff.	
"	Order endorsed on above motion for extension of time, as follows: "By reported agreement of counsel, this motion may be granted, and the extension is hereby approved." Latimer, U.S. Mag. (extension to Nov. 22, 1974) M-11/15/74 Copies mailed.	
11/21	Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, filed by plaintiff.	
12/3	Hearing on Defendant's Motion for Summary Judgment "Decision Reserved." Latimer, U.S. Mag. M-12/4/74.	
12/17	Supplemental Memorandum of Law in Opposition to Defendant's Motion for Summary Judgment, filed by plaintiff.	
12/27	Tape Recording of proceedings held on Dec. 3, 1974 (Motion for Summary Judgment), filed by U.S. Magistrate Latimer.	
1975		
1/16	Pretrial scheduled before Judge Newman "over to indefinite date, pending AHL decision."	
9/3	Ruling on Defendant's Motion for Summary Judgment, entered. Defendant's Motion for Summary Judgment is granted. Latimer, U.S. Magistrate. So Ordered. Newman, J. M-9/3/75 Copies mailed.	
9/4	Summary Judgment entered in favor of defendant, dismissing action. Markowski, C. M-9/4/75 Copies mailed.	
9/29	Notice of Appeal, filed by Plaintiff. Copies mailed.	
"	Bond for Costs on Appeal, filed by Plaintiff. Copies mailed.	
"	Copy of Notice and Bond and of Docket Entries mailed to Clerk, U.S. Court of Appeals.	

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARON CAMASSAR, Administrator, C.T.A., D.B.N. of the Estate of Carvel P. Gramlich, Plaintiff vs UNITED STATES OF AMERICA, Defendant	CIVIL ACTION NO. 15845 COMPLAINT

FIRST COUNT

1. This action is brought under the Federal Tort Claims Act, 28 U.S.C. Secs. 1346 (b), 2671 et seq., as hereinafter more fully appears.

2. The plaintiff is a resident of the State of Connecticut and is the Administrator of the Estate of Carvel P. Gramlich, deceased, late of Groton, Connecticut, hereinafter referred to as "plaintiff's decedent."

3. As of February 16, 1972, and for a long time prior thereto, the defendant, through its Department of the Navy, owned, possessed, and controlled the Earle Naval Depot in Leonardo, New Jersey.

4. Located at the Earle Naval Depot was loading pier #2, upon which was located a roadway for vehicular traffic and tracks for train traffic.

5. On February 16, 1972, the plaintiff's decedent was a passenger in a pick-up truck being operated on the pier #2 roadway, when it became caught in the railroad tracks, skidded, went out of control, and went off the roadway into the water, causing the plaintiff's decedent to drown.

LAW OFFICES
SUISMAN, SHAPIRO,
WOOL & BRENNAN
325 STATE STREET
NEW LONDON,
CONNECTICUT 06320

6. The pier roadway was, and had been for a long time prior thereto, in a defective and dangerous condition in that the railroad tracks made the roadway unsuitable for vehicular traffic, in that the pier was not posted for warnings of the presence of railroad tracks, in that the railroad tracks caused the roadway to be slippery and made management of vehicles difficult, in that inadequate railings or fences were placed along the pier.

7. The defendant and its employees knew or should have known that the pier roadway was in a defective and dangerous condition and allowed it to continue without taking adequate steps to abate the danger or correct it.

8. The defendant's allowing the pier roadway to remain in a defective and dangerous condition proximately caused the death of the plaintiff's decedent.

9. This action is brought to recover damages for the wrongful death of the plaintiff's decedent and for the funeral expenses caused by the death.

10. Under date of February 15, 1973, a claim was filed with the Department of the Navy setting forth the aforesaid claim; said claim was denied by said Department on March 27, 1973, and this suit was duly commenced within six months of the denial.

WHEREFORE, THE PLAINTIFF DEMANDS JUDGMENT AGAINST THE DEFENDANT IN THE SUM OF $250,000.00., AND COSTS.

SECOND COUNT

1. Paragraphs 1 through 6 of the First Count are hereby incorporated by reference and made corresponding Paragraphs of the Second Count.

7. The defendant and its employees were negligent and careless in that they knew or should have known that the pier roadway was in a defective and dangerous condition and allowed

LAW OFFICES
SUISMAN, SHAPIRO,
WOOL & BRENNAN
325 STATE STREET
NEW LONDON

it to continue without taking adequate steps to correct or eliminate the dangerous condition.

8. The death of the plaintiff's decedent was proximately caused by the defendant's negligence and carelessness.

9. Paragraphs 9 and 10 of the First Count are hereby incorporated by reference and made corresponding Paragraphs of the Second Count.

WHEREFORE, THE PLAINTIFF DEMANDS JUDGMENT AGAINST THE DEFENDAT IN THE SUM OF $250,000., AND COSTS.

/s/ Dale P. Faulkner

Dale P. Faulkner, Esq. of
Suisman, Shapiro, Wool and
Brennan
325 State Street
New London, Connecticut
Attorney for the Plaintiff

/s/ James F. Brennan, Jr.

James F. Brennan, Jr., Esq., of
Suisman, Shapiro, Wool and
Brennan
325 State Street
New London,Connecticut
Attorney for the Plaintiff

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARON CAMASSAR, Administrator, C.T.A., D.B.N. of the Estate of Carvel P. Gramlich :

v. : CIVIL NO. 15,845

UNITED STATES OF AMERICA :

ANSWER

The United States of America for its answer states as follows:

1. Paragraph 1 is a matter of law and is neither admitted nor denied.

2. Paragraph 2 is admitted upon information and belief.

3. Paragraph 3 and 4 are admitted.

4. Paragraph 5 is admitted through the word "roadway"; as to the remainder of the Paragraph, the defendant is without knowledge.

5. Paragraphs 6 through 8 are denied.

6. Paragraphs 9 and 10 the defendant is without knowledge.

COUNT TWO

1. Those answers to the first count are incorporated as answers to the second count.

2. Paragraphs 7 and 8 are denied.

Wherefore the defendant prays that the plaintiff's complaint be dismissed with costs to the defendant.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. The Complaint lacks subject matter jurisdiction, Feres v. United States, 340 U.S. 135 (1950).

3. The plaintiff's decedent assumed the risk.

UNITED STATES OF AMERICA

STEWART H. JONES
United States Attorney

CERTIFICATION

This is to certify that a copy of the foregoing Answer has been sent postage paid this day of November, 1973 to: Suisman, Shapiro, Wool & Brennan, 325 State Street, New London, CT and Peter W. Boie, Esq., Civil Division, Department of Justice, Washington, D. C.

HENRY S. COHN
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARON CAMASSAR, Administrator, C.T.A., D.B.N. of the Estate of Carvel P. Gramlich, Plaintiff	CIVIL ACTION NO. 15845
vs.	
UNITED STATES OF AMERICA, Defendant	STIPULATION

It is hereby stipulated by and between the plaintiff and the defendant as follows:

1. On February 16, 1972 the Plaintiff's decedent was on active duty in the U.S. Navy, serving in Pay Grade E-7, as a Chief Torpedoman's Mate.

2. On said date the deceased was assigned to the U.S.S. Fulton, a U.S. Naval Submarine Tender.

3. On said date the said U.S.S. Fulton was docked on Pier 2, Naval Ammunition Depot, Earle, New Jersey.

4. During the morning of said date, the deceased was engaged in loading the said U.S.S. Fulton.

5. After loading the ship the deceased went to lunch on shore. He returned to the ship at approximately 1:00 P.M. for a muster.

6. At approximately 1:30 P.M. on said date the deceased went on authorized liberty, and departed the ship. He spent the afternoon on shore with several shipmates and friends. Two of said friends were Chief Charles H. Koblenzer, USN, and Chief William J. Bentfield, USNR. The decedent was at the Petty Officers Club at about 2:30 P.M. with Chief Koblenzer. During that time, the decedent and Koblenzer arranged for an initiation

LAW OFFICES
SUISMAN, SHAPIRO,
WOOL & BRENNAN, P.C.
1028 POQUONNOCK ROAD
GROTON, CONN. 06340

party at the Club. The initiation party started at about 4:00-4:15 P.M. and ended at about 5:45. The decedent, Koblenzer, Bentfield and Chief Grady J. Broussard, USN, stayed at the bar of the Club until about 8:30 to 9:00 P.M. During the afternoon, Koblenzer and the decedent arranged to pick up some wood for the decedent to use in making a model sailboat.

7. At about 8:30 to 9:00 P.M. Koblenzer returned to the ship,in his privately owned vehicle. The decedent and Chiefs Bentfield and Broussard accompanied Koblenzer. When they arrived at the ship, at about 9:30 P.M. the decedent and Bentfield carried the decedent's lumber on board the ship. After they accomplished this, Koblenzer advised the decedent and Bentfield that he, Koblenzer, was going to meet his girlfriend for something to eat. The decedent and Bentfield said that they would go with Koblenzer. The parties stayed on the ship for about 15 minutes.

8. At approximately 9:45 P.M., with Koblenzer driving his privately owned truck, with the decedent and Bentfield passengers, the men left the ship to return to shore.

9. While proceeding on the pier on the way to shore, the accident, which is the subject of this suit, occurred, resulting in the death of the decedent.

Dated at Hartford, Connecticut, this ___day of November, 1974.

UNITED STATES OF AMERICA

Peter C. Dorsey
United States Attorney

By_____
Henry S. Cohn
Assistant U.S. Attorney

Dated at Groton, Connecticut, this_____day of November, 1974.

PLAINTIFF

BY_____ Thomas B. Wilson
His Attorney

LAW OFFICES
...SMAN, SHAPIRO,
...OL & BRENNAN, P.C.
28 POQUONNOCK ROAD
...OTON, CONN. 06340

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

CARON CAMASSAR, Administrator of, C.T.A., D.E.N. of the Estate of Carvel P. Gramlich :

v. : CIVIL NO. 15,845

UNITED STATES OF AMERICA :

MOTION FOR SUMMARY JUDGMENT

The defendant United States of America pursuant to Rule 56 Federal Rules Civil Procedure hereby moves for Summary Judgment in the above-captioned case.

UNITED STATES OF AMERICA

PETER C. DORSEY
United States Attorney

By _____
HENRY S. COHN
Assistant U. S. Attorney

CERTIFICATION

This is to certify that a copy of the foregoing Motion has been mailed postage paid to: Thomas B. Wilson, Esquire, 1028 Poquonnock Road, Groton, CT this 6th day of November, 1974.

_____
HENRY S. COHN
Assistant U. S. Attorney

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARON CAMASSAR, Administrator, :
C.T.A., D.B.N. of the
Estate of Carvel P. Gramlich :

V. : CIVIL ACTION NO. 15,845

UNITED STATES OF AMERICA :

In his customary thoughtful and thorough fashion, Magistrate Latimer has endeavored mightily to construct a rationale that will explain the doctrine of Feres v. United States, 340 U.S. 135 (1950), harmonize its progeny, and thereby indicate on which side of the Feres line this case falls. The resulting test of remoteness between injury and the injured person's military status unhappily leaves uncertain the criteria by which remoteness is to be measured. Specifically, it is not clear whether the Feres obstacle to suit if the claim does "arise out of . . . activity incident to service" or "arise out of . . . military duty," Feres v. United States, supra, at 146, depends on what the claimant is doing or where he is doing it. The decided cases seem to indicate that if the injury occurred on a base, the claim is barred, whereas an injury off the base might or might not be barred depending on what the claimant was doing. If that is the correct approach, it at least makes decisions more certain for injuries either on a base or within the confines of a functional equivalent. The roadway alleged to be defective in

this case is located on a loading pier that is part of a depot owned and controlled by the Navy. That location is sufficiently the equivalent of a military base to invoke whatever considerations underlie the Feres decision.

The defendant's motion for summary judgment is therefore granted for these reasons and for the reasons more fully developed in the Magistrate's proposed ruling attached as Appendix A, which is adopted as the Court's ruling.

Dated at Hartford, Connecticut, this 2 day of September, 1975.

Jon O. Newman
United States District Judge

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARON CAMASSAR, Administrator, C.T.A., D.B.N. of the Estate of Carvel P. Gramlich, Plaintiff	
VS.	CIVIL ACTION NO. 15,845
UNITED STATES OF AMERICA, Defendant	

RULING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

This is a wrongful death action brought under the Federal Tort Claims Act (28 U.S.C. §§ 1346(b) and 2671, et seq.), arising from the death of plaintiff's decedent in a motor vehicle accident while serving in the United States Navy. On motion for summary judgment, defendant contends that the undisputed circumstances show the case to be within the bar to suit "for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service" first announced by Supreme Court interpretation of the Act's intended scope in Feres v. United States, 340 U.S. 135, 146 (1950).

The parties' fact stipulations demonstrate the following:

On the date of the accident, Wednesday, February 16, 1972, decedent was serving as a Chief Torpedoman's Mate on the U.S.S. Fulton, a navy submarine tender then docked "on Pier 2, Naval Ammunition Depot, Earle, New Jersey". Decedent was en-

gaged in loading the ship during the morning, leaving for lunch on shore when the task was concluded, returning for a muster at about 1:00 P.M., and departing the ship again at approximately 1:30 P.M. on authorized liberty -- which counsel for both parties explained at oral argument as meaning freedom to enjoy the rest of the day off. The afternoon and early evening were spent on shore with several shipmates and friends, mainly at the Petty Officers' Club; decedent was driven back to the ship by Chief Charles H. Koblenzer at about 9:30 P.M. in the latter's privately owned truck, dropped off some wood for use in making a model sailboat, and left the ship once more as a passenger in Koblenzer's truck at approximately 9:45 P.M. after Koblenzer indicated that he was going back to shore to meet his girl-friend and to get something to eat. The accident in suit occurred on the way.

Defendant's answer admits plaintiff's allegations that the government "through its Department of the Navy, owned, possessed and controlled" the depot, including loading pier no. 2 "upon which was located a roadway for vehicular traffic and tracks for train traffic"; as to the accident's circumstances, the complaint further alleges that Koblenzer's truck "became caught in the railroad tracks, skidded, went out of control, and . . . off the roadway into the water, causing . . . decedent to drown", as the result of the roadway's "dangerous and defective condition" negligently left uncorrected and consisting of driving hazards posed by the tracks' presence and the lack of warning signs and adequate railings.

The Federal Tort Claims Act does not in terms preclude suits by military personnel other than for claims "arising out

of . . . combatant activities . . . during time of war", 28 U.S.C. § 2680(j), but while narrow construction of the statute's generally framed waiver of sovereign immunity may be suspect, cf. Rayonier, Inc. v. United States, 352 U.S. 315, 319-320 (1957), the right to sue has long been held not to extend to servicemen injured on peacetime active duty as the result of carelessness on the part of other members of the armed forces, see Feres v. United States, supra. The Feres doctrine was originally stated in the context of three claims deemed insufficient, two instances of alleged malpractice by army surgeons and a negligence claim arising from an army lieutenant's death in a barracks fire allegedly resulting from a defective heating plant and an inadequate fire watch, see id. at 136-137, and the Court expressly distinguished earlier recognition of a right of action for "injury . . . [which] did not arise out of or in the course of military duty", id. at 146, in Brooks v. United States, 337 U.S. 49 (1949), permitting suit by two soldiers injured on leave when their private automobile was struck on a public highway by an army truck negligently driven by a civilian army employee, see id. at 50.

Feres has been explained as impelled by the Court's concern with the

> "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . ."

United States v. Brown, 348 U.S. 110, 112 (1954), as quoted in United States v. Muniz, 374 U.S. 150, 162 (1963). If so, any actual "discipline" nexus would seem rather tenuous in the

usual malpractice action, but it may be noted that even Brown's allowance of suit by a veteran for post-discharge malpractice in a Veterans Administration hospital in connection with treatment of an underlying service-connected injury provoked sharp dissent by three members of the Court, United States v. Brown, supra at 113-114, Brown itself has not been generously interpreted, see Henning v. United States, 446 F.2d 774 (3 Cir. 1971), cert. denied, 404 U.S. 1016 (1972), cf. Shults v. United States, 421 F.2d 170 (5 Cir. 1969), and the in-service medical malpractice claim has been consistently rejected to date, see, e.g., Harten v. Coons, 502 F.2d 1363 (10 Cir. 1974), cert. denied, 420 U.S. 963 (1975), Lowe v. United States, 440 F.2d 452 (5 Cir.), cert. denied, 404 U.S. 833 (1971), Buckingham v. United States, 394 F.2d 483 (4 Cir. 1968), Norris v. United States, 137 F. Supp. 11 (E.D.N.Y. 1955), aff'd per curiam, 229 F.2d 439 (2 Cir. 1956).

Although Feres and Brown leave little factual middle ground for malpractice litigation, the widely differing circumstances of the barracks fire tragedy in Feres and the ordinary motor vehicle accident in Brooks naturally afford greater possible scope for entertaining in-service accidental injury claims. It is fair to state in this context also, however, that while the "precise rationale for the Feres rule and its continuing validity have been the source of some confusion", Henninger v. United States, 473 F.2d 814, 815 (9 Cir.), cert. denied, 414 U.S. 819 (1973), the majority of lower court decisions have traditionally considered Brooks the exceptional situation, "effectively requiring the military claimant to demonstrate that even an off-duty injury has no significant

link with conditions of life in the armed forces", Boyd v. United States, Civil No. 15,384 (D. Conn. 1973), aff'd, 493 F.2d 1397 (2 Cir. 1974) (Table). If questionable to remark simply that "Feres required no nexus between discipline and injury", Hall v. United States, 451 F.2d 353, 354 (1 Cir. 1971), the more commonly articulated focus on whether the serviceman was in some sense subject to military control or discipline at the time of injury, see, e.g., Mills v. Tucker, 499 F.2d 866, 867-868 (9 Cir. 1974), see also Herreman v. United States, 476 F.2d 234 (7 Cir. 1973), Hale v. United States, 452 F.2d 668 (6 Cir. 1971), is perhaps better understood as a test of remoteness between injury and the injured person's military status, see Knight v. United States, 361 F. Supp. 708, 713 (W.D. Tenn. 1972), aff'd, 480 F.2d 927 (6 Cir. 1973) (Table), cf. Gursley v. United States, 232 F. Supp. 614 (D. Colo. 1964). In that regard, Supreme Court comment that its construction of the Federal Tort Claims Act in Feres ruling out service-related claims "seems best explained" as prompted by such considerations as "the effects of the maintenance of such suits on discipline", United States v. Muniz, supra at 162, would appear just that -- notation of a persuasive basis for original adoption of the statutory interpretation, and not an invitation to analyze each such claim to determine whether the particular suit would in fact "undermine traditional concepts of military discipline", as attempted by one district court in Downes v. United States, 249 F. Supp. 626, 628 (E.D.N.C. 1965).

In Boyd v. United States, supra, this Court did dismiss an off-duty, on-base traffic accident claim directly challenging the adequacy of responsible military authorities' regulation of

the United States Air Force base on Bermuda, but application of Feres there was influenced by the distinct and explicit "foreign country" suit exclusion mandated at 28 U.S.C. § 2680(k), and the current state of the law has been fully re-examined in weighing the circumstances of the present case. With Boyd in mind, plaintiff has specifically represented -- and defendant has not disputed -- that the ship on which decedent served "was permanently homeported at the U.S. Naval Base in Groton, Connecticut and was docked at the Naval Ammunition Depot in . . . New Jersey for only temporary purposes", contending that the liability claim here of inadequate maintenance of depot facilities would not concern the shipboard command to which decedent was more immediately subject, but the fact that one Navy authority rather than another would be called to task is not ultimately significant in this case. As suggested above, the more realistically critical test of whether a serviceman's injuries "arise out of or are in the course of activity incident to service" or "arise out of or in the course of military duty", Feres v. United States, supra at 146, is the existence or absence of meaningful causal connection between the injury occurrence and the injured person's military service.

Examined in that light, emerging authority from the Ninth Circuit may be illustrative. Mentioned in Boyd as an example of the short shrift frequently given off-duty, on-base injury claims, Coffey v. United States, 324 F. Supp. 1087 (S.D. Cal. 1971), aff'd per curiam, 455 F.2d 1380 (9 Cir. 1972), held suit against the government barred for the death of a marine apparently heading for off-post liberty when the car in which he was a passenger was struck by a train engine "at the inter-

section of a government-maintained private road and the railroad tracks within the confines of the military reservation", the fatal collision allegedly having resulted from failure "to properly mark and guard the railroad crossing", id., 324 F. Supp. at 1087. By contrast, Mills v. Tucker, supra, more recently sanctioned litigation arising from the death of a naval petty officer in a traffic accident caused in part by the Navy's negligent road maintenance; there, the highway was a publicly used base access road, adjacent to but fenced off from a naval depot and also connecting different civilian areas travelled on by decedent while on furlough and returning from a civilian "moonlighting" job to his quarters on another military base to attend his son's birthday party, id. at 867-868. Recovery in the latter case was of course sustained because the injury was recognized as the equivalent of that in Brooks, "not caused by . . . service except in the sense that all human events depend upon what has already transpired", Brooks v. United States, supra at 52, see Mills v. Tucker, supra at 867. Conceding that Coffey meant "the fact that a serviceman was off duty or on leave is not always dispositive", the Court of Appeals distinguished the accident on base as a situation "where the serviceman is at least subject to ultimate military control", Mills v. Tucker, supra at 868.

Although doubtful in any event that the proferred distinction between questioning base and ship commands would be of consequence, there should be no impediment to the type of liability claim advanced by plaintiff if decedent's military service was a fortuitous element, as in Mills, but that is not the situation presented. The strongest argument supporting

plaintiff's reliance on Brooks obviously is that decedent was freed from duty obligations and pursuing his personal affairs at the time of the accident, yet the occurrence so clearly stems from decedent's navy service that it is entirely appropriate to regard the accident site an overriding factor. While the state of temporary "liberty" should not be thought a technical quibble, compare Shults v. United States, supra at 171, decedent's presence at the depot and use of the allegedly hazardous pier roadway were far from sheer happenstance, being instead closely related to his active duty assignment at the naval facility. It seems unlikely that Feres would have been differently decided if the army officer's presence in his assertedly unsafe barracks quarters was as much the product of freedom of choice off duty as decedent's ill-fated venture along the pier, see Gursley v. United States, supra, but cf. Wilcox v. United States, 117 F. Supp. 119, 122-123 (S.D.N.Y. 1953), and not plausibly determinative here that decedent met his death within the depot's confines rather than on board the ship itself. Although the balancing of pertinent factors could be obscured by such potentially conceptualistic inquiry as whether decedent was "at least subject to ultimate military control", Mills v. Tucker, supra at 868, the causal nexus between injury and military service appears so plain on the record submitted in the instant action that the Court must conclude that plaintiff's claim does indeed "arise out of . . . activity incident to service" or "arise out of . . . military duty", Feres v. United States, supra at 146.

There being no genuine issue of fact material to that conclusion, and defendant accordingly being entitled to judg-

ment as a matter of law, cf. Rule 56(c), Fed. R. Civ. P., defendant's motion for summary judgment is hereby granted.

Dated at New Haven, Connecticut, this 25th day of August 1975.

Arthur H. Latimer
United States Magistrate

SO ORDERED

United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

GARON CAMASSAR, Administrator, C T A , D B N of the Estate of Carvel P. Gramlich *

vs. * Civil Action No. 15,845

UNITED STATES OF AMERICA *

SUMMARY JUDGMENT

This cause having come on for consideration on defendant's Motion for Summary Judgment before United States Magistrate Arthur H. Latimer, and said United States Magistrate having rendered a proposed Ruling on Defendant's Motion for Summary Judgment and the Court (Newman, J.) having rendered a further ruling adopting the proposed ruling of the United States Magistrate, under date of September 3, 1975, granting defendant's Motion,

It is ORDERED and ADJUDGED that summary judgment be and is hereby entered in favor of the defendant dismissing this action.

Dated at New Haven, Connecticut this 3rd day of September, 1975

Sylvester A Markowski

Clerk, United States District Court

By Kathleen J. Coughlin
Deputy-In-Charge